UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-v- No. 16 Cr. 525 (JGK)

JOSEPH EZRIEL STERN,
a/k/a "Izzy,"
a/k/a "EZ," and

HUGO RUIZ-FLORES,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOSEPH STERN'S PRETRIAL MOTIONS

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PRELIMINARY STATEMENT

Joseph Stern is charged in a four-count indictment alleging violations of the federal money laundering statutes. Specifically, Mr. Stern is charged with one conspiracy count and three counts of substantive concealment money laundering. The government alleges that Mr. Stern knowingly and intentionally engaged in financial transactions with proceeds of narcotics trafficking, and with the intent to conceal the nature, location, source, ownership and control of the proceeds. The concealment money laundering counts allege transactions that occurred from November 2014 to March 2015. Mr. Stern vigorously denies these allegations and will seek a jury trial in this case.

This memorandum is respectfully submitted in support of defendant Stern's omnibus pretrial motions. These motions seek suppression of the government's evidence due to repeated, serious constitutional violations by law enforcement in the obtaining and collection of this evidence. Specifically, Mr. Stern moves: (1) to suppress all wiretap evidence on grounds that the original application lacked probable cause under the Fourth Amendment and Title III, partly because it included recklessly or intentionally false and misleading information that should have been excised from probable cause findings, and omitted highly relevant information about Mr. Stern's known employment; (2) to request a *Franks* hearing to determine if the agent "recklessly disregarded the truth" in presenting information on the original wiretap application; (3) to suppress all wiretap evidence because the government failed to take reasonable measures to ensure compliance with Title III minimization requirements and, in fact, the lack of minimization was objectively unreasonable; (4) to suppress Mr. Stern's post-arrest statement providing the passcode to his Apple iPhone 6S (hereafter, the "Stern Phone"), and all "fruits" obtained from the violation of Mr. Stern's Fifth Amendment privilege; and (5) to suppress all evidence obtained in the search of the Stern Phone because the search warrant lacked particularity and was overbroad in violation of the Fourth Amendment.

Joseph Stern is a 61-year-old lifelong resident of Brooklyn, New York. He is a father and grandfather, who has lived an unblemished law-abiding life. Most importantly, for purposes of these motions, Mr. Stern has worked the last 18 years at a wholesale luxury watch reseller, called TimeWorks International, Inc. ("TimeWorks"). (Ex. A.)[1] Mr. Stern is a salesman for TimeWorks. (*Id.*) He solicits watches to retail store owners and other third-party distributors. (*Id.)* He attends near monthly trade conferences hosted by the International Watch and Jewelry Guild ("IWJG"), where he staffs the TimeWorks booth to sell watches to Guild members, who are often other watch distributors. *(Id.)* Mr. Stern is paid on salary, not commission. He never made more than $80,000 per year, and has no ownership interest or profit-sharing in TimeWorks. (*Id.)* While a substantial amount of watch sales is conducted in cash at the trade shows and at the office, Mr. Stern never knew or believed that cash used to buy or transfer watches was derived from the proceeds of narcotics trafficking. Contrary to the government's claims in its wiretap and search warrant applications, Mr. Stern never ran a "front" company, never controlled bank accounts allegedly used to "launder" drug proceeds, and certainly never conspired with international narcotics traffickers from Mexico.

For the immediate purposes of these motions, this Court should suppress the government's evidence referred to herein partly due to the repeated reckless omissions and misleading statements made in the agents' applications which wholly disregarded Mr. Stern's employment history and position at TimeWorks, and that business's long history of legitimate operations and ownership by parties unrelated to Mr. Stern. Extraordinarily, the Drug Enforcement Administration ("DEA") agents' applications in this case never mentioned Mr. Stern's role as a watch salesman or referred to this business at all. Instead, the agents deceptively gave judges, who reviewed search warrant and wiretap applications, the misleading and false impression that Mr. Stern simply collected bulk cash shipments of narcotics proceeds on a street corner in Brooklyn, completely detached from his job as a watch salesman. These motions seek to remedy these egregious errors.

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[1] All exhibits referenced herein are attached to the Declaration of Henry E. Mazurek, Esq., dated February 17, 2017, and filed herewith together with Mr. Stern's Notice of Pretrial Motions.

ARGUMENT

POINT I

THE COURT SHOULD SUPPRESS ALL RECORDINGS OBTAINED FROM THE FEDERAL WIRETAP OF THE STERN PHONE

The government seeks to introduce evidence of law enforcement intercepted recorded conversations obtained from federal Title III applications made by DEA agents to intercept wire (and, in some instances, electronic) communications of a cellular telephone number subscribed to Mr. Stern for the period from March 2, 2015 through May 21, 2015.

Mr. Stern moves to suppress all of the wiretap evidence and the fruits of that evidence on grounds that the applications were statutorily and constitutionally deficient. Counsel is unaware of any previous challenges to these specific wiretaps and understands that the Orders authorizing the above wire interceptions have not been previously ruled upon by any other court.

A. Applicable Legal Standards

Legal review of federal wiretap applications and orders, and the seized recordings that follow them, are governed by the Fourth Amendment in the first instance. Additional limitations have been imposed by Congressional statutes, popularly known as "Title III." *See* 18 U.S.C. §§ 2510-2522.

Federal statutory conditions on Title III wiretaps include: (1) a showing of probable cause to believe that an individual is committing a particular offense; (2) that particular communications concerning that offense will be obtained through such interception; (3) that the government has exhausted other investigative techniques; and (4) that the individual who is the focus of the wiretap investigation will use the tapped phone to carry out the particular offenses. *See* 18 U.S.C. § 2518(3)(a)-(d).

Title III requires that eavesdropping "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." 18 U.S.C. § 2518(5). To that end, "[e]very order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, [and] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." *Id.* This obligation to minimize serves as a safeguard against undue intrusion of privacy. *United States v. Terry*, 702 F.2d 299, 312 (2d Cir. 1983). Compliance with the minimization requirement is determined by an analysis of the reasonableness of the surveilling agents' conduct based on the totality of the circumstances. *Scott v. United States*, 436 U.S. 128, 139 (1978). The government has the burden to show good faith compliance with minimization requirements. *United States v. Rizzo*, 491 F.2d 215, 217 n. 7 (2d Cir. 1974). If "a *prima facie* showing is made, the burden shifts to the defendant to show that, despite a good faith compliance with the minimization requirements, a substantial number of non-pertinent conversations have been intercepted unreasonably." *United States v. Rajaratnam*, No. 09 Cr. 1184, 2010 WL 4867402, at *27 (S.D.N.Y. Nov. 24, 2010).

Congress authorized wiretaps only "upon compliance with stringent conditions" that implement the congressional "policy . . . strictly to limit the employment of those techniques." *Gelbard v. United States*, 408 U.S. 41, 46-47 (1972). Among those "stringent conditions" are the requirements that the government's application provide a "full and complete statement of the facts and circumstances" establishing probable cause and of the necessity of the wiretap. 18 U.S.C. § 2518(1)(b)-(c).

B. The Government Lacked Probable Cause to Justify the Original Wiretap on March 2, 2015

The affidavit of DEA Agent James J. Enders, dated March 2, 2015 ("Enders Affidavit"), lacked sufficient probable cause to believe that evidence would be found on the Stern Phone that Stern "provides money laundering services to members of drug trafficking organizations located in the United States and Mexico . . . by accepting bulk drop-offs of cash proceeds of narcotics transactions and by delivering cash in bulk quantities to other members of drug organizations." (Ex. B, ¶ I.D(a), p. 5.)

The Enders Affidavit lacked probable cause for the following reasons: (1) the affidavit did not present sufficient evidence to show there was a fair probability that Mr. Stern participated in a narcotics trafficking money laundering scheme; (2) the affidavit omitted and misstated information about Mr. Stern's position as a sales agent for a legitimate watch wholesaler (*see Franks* Section I(C), *infra*); (3) the information relied upon by Agent Enders was stale or not indicative of narcotics money laundering conduct; and (4) the reliability of the confidential sources of information were not sufficiently established or corroborated.

The Enders Affidavit was extraordinarily short on facts linking Mr. Stern to money laundering services on behalf of international narcotics traffickers. Enders principally relied on: (1) several-years-old information from two confidential sources, which was largely uncorroborated; (2) the fact that some money couriers had Mr. Stern's phone number on their cell phones; and (3) multiple undercover agent calls that were made principally in Spanish (a language the agents knew Mr. Stern did not speak), and which failed to identify the source of the cash payments. These three pieces of information made up almost the entirety of probable cause reported in the Enders Affidavit. Together, they were insufficient to establish probable cause under the Fourth Amendment or Title III.

1. Agent Enders Intentionally or Recklessly Misled the Reviewing Court by Not Mentioning Mr. Stern's Employment at TimeWorks International, Inc.

The most striking and misleading aspect of Agent Enders' affidavit was his complete omission of Mr. Stern's employment at TimeWorks, a watch wholesaler whose offices are located at 449 20th Street in Brooklyn, New York. A basic Internet search of TimeWorks' Brooklyn address reveals the company's profile and type of business: "Time Works International Inc. was founded in 1994. The company's line of business includes the wholesale distribution of jewelry, precious stones and metals, costume jewelry, watches, clocks, and silverware." (Ex. C, www.bloomberg.com.) A search also reveals the identity of TimeWorks' owner and President (Chaim Fischer), its annual revenue, number of employees, years in business, and state of incorporation. (Exs. D and E.)

In multiple places in his Affidavit, Enders referred to TimeWorks' business address (449 20th Street, Brooklyn, New York) as the location of so-called "drop-offs of narcotics proceeds" to Stern (Ex. B, p. 5), but nowhere did Enders report to the reviewing court that this was Mr. Stern's employer's address. (*See* Ex. B, pp. 19, 26, 32, 33.) While reporting that this address was publicly identified as TimeWorks place of business, the agent *failed to inform the court that Mr. Stern worked as a salesman there.* (*See* Ex. B, p. 33.) Enders did not even discuss what business

TimeWorks conducted. Instead, misleadingly, he only reported the address as "the same address that CS-1 previously used to deliver narcotics proceeds to STERN." (*Id.*)

Enders had ready access to information that showed Mr. Stern was a long-time employee of TimeWorks (including email, travel and banking information). (Ex. B, p. 19.) Indeed, it is hard to conceive that Agent Enders did not have this information after indicating that the DEA first began investigating Stern in December 2010 – almost five years before the wiretap application. (*Id.* at 17.) Enders knew or had every reason to know, based on banking and email records, that TimeWorks was a wholesale watch reseller and Mr. Stern was a sales agent for them for many years. For example, the agent collected travel records for Mr. Stern that would have showed regular travel to watch and jewelry trade shows, where TimeWorks sold its inventory. (*See* Ex. B, p. 19; *see also* Ex. A, Stern Decl., ¶ 4 (indicating trade shows hosted by International Watch and Jewelry Guild)).

This information about Mr. Stern's employment at TimeWorks would have been highly relevant to the reviewing court. It is important context to explain the "dropping off" of cash payments to Mr. Stern. Based on Enders' Affidavit, the court was left with the misleading and false impression that Stern was receiving bags of cash on a street corner for no apparent reason. It is peculiarly probative to know that Mr. Stern was a sales agent for a watch and jewelry wholesaler who accepted cash payments for inventory. (*See* Ex. A, ¶¶ 3-4.) The reviewing court was never made aware of this context for any of the currency transactions. Indeed, Enders falsely claimed that he "believe[d] that the entity 'Timeworks Worldwide LLC' is a front organization used by STERN to provide a legitimate face for his laundering activities." (Ex. B, pp. 19, 42.) Enders knew – from a quick Internet search – that TimeWorks had been in business for more than 22 years, that it was owned by someone else (Chaim Fischer), and had reported revenues of several million dollars per year. (*See* Exs. C, D, and E.) Enders' dishonest claim that TimeWorks was Stern's front organization was "designed to mislead," or at least was "made in reckless disregard of whether [it] would mislead." *United States v. Awadallah*, 349 F.3d 42, 68 (2d Cir. 2003).

The agent's misstatements did not end there. Enders also falsely claimed that Stern had access to and still "uses bank accounts opened in the name of a company that he controls in order to mask the origin and purpose of those funds." (Ex. B, p. 4.) This is a known falsehood. As stated above, in his affidavit, Enders talked about email accounts, banking information and travel records for Mr. Stern at TimeWorks. He also had general access to business information about TimeWorks from basic Internet searches. New York State government records and Bloomberg and Manta websites indicated that someone other than Stern owned TimeWorks. (Exs. D, E.) The agent had to know from subpoenaed banking records that Mr. Stern had no access or control over TimeWorks' accounts. Mr. Stern was a salaried salesman who had no management authority whatsoever at this company. Agent Enders had every reason to know this when he added the false statement about Mr. Stern's "control" of TimeWorks and "use" of its bank accounts for alleged money laundering. (*See* Ex. B, p. 4.)

The Constitution's "obvious assumption" is that the constitutionally mandated showing of probable cause "will be a *truthful* showing" by the government. *Franks v. Delaware,* 438 U.S. 154, 164-65 (1978). Indeed, "[b]ecause it is the magistrate who must determine independently whether there is probable cause," it is "an unthinkable imposition" upon both the judge's "authority" and the Constitution's command of prior judicial authorization when "a warrant affidavit is revealed after the fact to contain a deliberately or recklessly false statement," *id.*, at 165, let alone the litany of recklessly false statements about Mr. Stern's "control" and "use" of TimeWorks as a "front organization."

2. The Confidential Source Information in Enders Affidavit Was Stale and Uncorroborated

Agent Enders further relied on information from two Confidential Sources (CS-1 and CS-2) to provide probable cause to support the Stern wiretap. However, this information was exceedingly stale and left uncorroborated.

First, Enders relied on information received from a DEA informant, CS-1, about alleged conduct by Stern dating back to 2009 and 2010. (Ex. B, pp. 17-18.) The information from CS-1 was provided to another DEA agent in December 2010, and re-told to Enders for use in his March 2, 2015 wiretap application. (*Id.* at 17.) Thus, at the time of the application, this information was more than five years old. No additional information was given about CS-1's alleged involvement with Mr. Stern. There was no corroboration provided in the Enders Affidavit to support CS-1's dated account. There was no explanation offered for the sudden termination of the alleged dealings between CS-1 and Mr. Stern. Indeed, there was no information provided by CS-1 after December 2010, or any indication that the DEA sought to verify or investigate this information five years ago, when it was provided.

Uncorroborated information that is five years old has little value in a wiretap application seeking current evidence. Indeed, in some circumstances, the case law has found information "stale" for purposes of creating probable cause when the information was only one month old. *See e.g., Sgro v. United States*, 287 U.S. 206 (1932) (undercover alcohol purchase at hotel 21 days prior to application was too remote in time); *United States v. Rowell*, 903 F.2d 899, 903 (2d Cir. 1990) ("The principal factors in assessing whether or not the supporting facts have become stale are the age of those facts and the nature of the conduct alleged to have violated the law.").

The information Enders relied upon from CS-2 is also not helpful in establishing probable cause in 2015. CS-2 is described as a Mexican national who was arrested on June 8, 2011 in

Illinois. (Ex. B, p. 19.) The Enders Affidavit did not state the benefit CS-2 received in exchange for his cooperation and did not provide any collaboration for his statements. CS-2's information also was quite old -- approximately four years old -- at the time the wiretap was sought. The uncorroborated tale by CS-2 was also inconsistent with other information included in the Enders Affidavit. CS-2 reported that he "obtained" (Ex. B, p. 20) large amounts of cash from Mr. Stern at the TimeWorks business office, whereas CS-1 reported that each time he or others went to TimeWorks office, they "delivered" (*Id.*, at 18) cash, which would also be consistent with the non-criminal conduct of making payment for watches or jewelry. Thus, CS-1 and CS-2's information was not corroborated by each other, but rather peculiarly different in a relevant way.

Finally, CS-2 could not be challenged or questioned regarding his 2011 statements before the filing of the 2015 wiretap application because he returned to Mexico and is no longer available to United States law enforcement. (Ex. B, p. 5, n. 1.)

3. The DEA's Use of an Undercover Agent to Call Mr. Stern Failed Because the Agent Spoke in Spanish on the Calls and the Information Exchanged Did Not Reveal Criminal Conduct

On a single day in July 2014 and again in February 2015, the DEA employed the investigative technique of placing calls to the Stern Phone by an undercover DEA agent to develop additional evidence of narcotics money laundering. Inexplicably, despite knowing that Mr. Stern is an orthodox Jew from Brooklyn with limited formal education, the undercover agent decided to call Mr. Stern using the Spanish language. This caused much confusion on the calls because Mr. Stern knew only a few words in Spanish. (*See* Ex. F, U/C Draft Transcripts.) It is hard to explain why the DEA employed this tactic of pretending only to speak Spanish to Mr. Stern when the idea of the call was to induce him to make inculpatory statements. As a result, the few recordings reveal an incoherent exchange between the undercover agent and Mr. Stern stumbling in a mix between

Spanish and English. Indeed, the DEA appears to have made these calls intentionally in a language that Mr. Stern did not understand. In its first call to Stern, the undercover agent asked, "You speak Spanish," to which he replied: "No, very little." (Ex. B, p. 22.) Nonetheless, the conversations continued with the undercover agent speaking a confusing mix of Spanish and English, and Mr. Stern struggling to reply. (*Id.*)

Also, the subject of these calls was not inherently criminal in nature. The undercover agent called Stern pretending to act on behalf of someone else to deliver cash to Stern at TimeWorks. This dialogue, by itself, does not suggest Mr. Stern's role in an international narcotics money laundering conspiracy, or any criminal behavior at all. Indeed, the undercover's calls do not even hint at an illegal source of funds. On his own, Mr. Stern connected the calls with one of his regular customers and purchaser of watches at TimeWorks, Hugo Ruiz. (Ex. B, p. 22.) Stern eventually asks the person on the other line, who agrees he is acting on behalf of the customer Ruiz, to deliver the money to TimeWorks' business office. (*Id.*, at 24; *see also,* at 32.)

These responses do not create a probability that Mr. Stern is knowingly engaging in the laundering of narcotics proceeds, unless you are to infer that because the undercover agent speaks Spanish and Mr. Ruiz, the TimeWorks customer who Mr. Stern assumes is connected to the call, is Mexican, that the proceeds being delivered must be the result of narco-trafficking. This kind of inferential leap requires reliance on nothing more than pure racial and ethnic prejudice and stereotyping, which is happening all too frequently today in upper levels of our federal government.

In the end, the undercover agent never carried through with a controlled delivery or any follow-up to these series of calls with Stern.

4. Toll Records Did Not Establish Probable Cause to Believe Stern Was Involved in Criminal Activity

The last set of evidence the Enders Affidavit relied upon to establish probable cause included a set of call records, *i.e.*, the incoming and outgoing phone numbers in contact with a particular phone. Agent Enders analyzed the call records for the Stern Phone during the six-month period from August 2014 to February 2015. Among the over 5,000 completed calls associated with the Stern Phone during this period, a handful included contacts with phone numbers subscribed to people the DEA had been investigating for narcotics or money laundering related offenses. These contacts, however, were usually not recurring and were in such small numbers that they were probative of nothing. Indeed, the agent had to state at least a few times in the affidavit that: "no direct contact is known to exist between CC-2 and STERN aside from the telephone contacts apparent on STERN'S toll history." (Ex. B, p. 36.)

The frequency of contacts between phone numbers of people being investigated by the DEA and the Stern Phone were sporadic, some were stale, and others were connected to actual watch and jewelry businesses in Mexico. Nothing could be said about these contacts other than a phone number contacted Mr. Stern's phone. The conversations were not known. It was not even clear from the affidavit whether any of the reported contacts resulted in actual conversations.

Indeed, some of the contacts with the Stern phone occurred on a single day and never again. For example, the affidavit mentions the x1820 Phone (*Id.* at 35), which had seven contacts (unclear how many, if any, included connected calls) with the Stern phone, but all on a single day: August 10, 2014. Agent Enders conceded there was no other connection between that phone number or the subscriber of the phone, and Stern. (*Id.* at 36.)

Three other phone numbers relied upon in the Enders Affidavit also revealed no recurring contact with the Stern Phone, including: (1) the x2601 Phone had six (unconnected or completed) contacts with the Stern phone on one day, January 29, 2015 (*id.*, 36); (2) the x5986 Phone had six contacts on January 29-30, 2015 (*id.*, 40); and (3) the Marley Phone had four contacts on February 3-4, 2015. (*Id.*) Oddly, all three of these different phone numbers' contact with the Stern phone occurred during a single week. This tends to indicate that these three numbers are somehow related, and Mr. Stern's lack of any ongoing contact or connection with *any* one of them actually defeats the government's claim that he was engaged in *any* business with them, let alone known criminal conduct. Indeed, for all of the identified subscribers of the phone numbers presented in the Enders Affidavit, the agent concedes no known connection between those subscribers and Mr. Stern.

Further undermining the government's claims connecting these bare phone contacts with Mr. Stern's knowing participation in "launder[ing proceeds] on behalf of narcotics traffickers" (Ex. B, p. 41) is the fact that the two Mexican phone number contacts relied upon in the application – Hugo Ruiz and [redacted] (Ex. B, pp. 36, 39) – both have watch and jewelry businesses in Mexico. In other words, contact with these individuals was absolutely consistent with the lawful business that Mr. Stern engaged in – being a salesman for a wholesale reseller of luxury watches – an employment that Agent Enders intentionally or recklessly omitted from his affidavit to the reviewing court.

C. The Court Should Grant a *Franks* Hearing to Determine If the Agent "Recklessly Disregarded the Truth" In Presenting Misleading Information and Omitting Highly Relevant Evidence in the Original Wiretap Application

The Fourth Amendment's answer to the government's multi-faceted abandonment of its constitutional duty to make a *truthful* showing of necessity and probable cause is suppression under *Franks v. Delaware*, 438 U.S. 154 (1978). This Court should grant a *Franks* hearing to require the agent to explain his reasons for the misleading statements about Mr. Stern's so-called "front" company and the extraordinary omissions about Stern's employment at TimeWorks, and TimeWorks business as a watch and jewelry wholesaler.

The Enders Affidavit painted a glaringly false and deceptive picture of Mr. Stern's conduct to the reviewing court by omitting his everyday job for the last 18 years. According to the Enders Affidavit, Mr. Stern worked out of a "front" office in Brooklyn, received bundles of cash regularly, and laundered them through accounts he "controlled" for the "front" company and redistributed them to Mexican narcotics traffickers. This picture is absolutely turned on its head if the conduct reported in the affidavit is placed in the context of Mr. Stern's actual employment.

The Enders Affidavit cannot sustain the required probable cause showing if its misleading facts are removed and its intentional or reckless omissions are considered. If a reviewing court knew what Agent Enders knew about Mr. Stern's daily employment, this wiretap application would never have been granted. The court should have known that when cash was delivered to 449 20th Street in Brooklyn, Mr. Stern occupied an office there as a salesman for a watch wholesaler. The court should have known that people other than Mr. Stern actually owned and controlled TimeWorks, and that Mr. Stern did not "control" that business's bank accounts. The court should have known that TimeWorks has been a functioning business – not a "front" – for more than 20 years and has had average annual revenues in the millions of dollars. (Exs. C, D, and E.) It also should have known that the two Mexican contacts who called Mr. Stern's phone had their own watch and jewelry businesses in Mexico, and that they were customers of TimeWorks for several years.

This cascade of relevant information undeniably re-orients the evidence of Mr. Stern's conduct presented in the Enders Affidavit from being one of a clandestine street-corner hoarder of drug cash to a faithful employee of a legitimate watch and jewelry business that happens to make sales in cash, including to Mexican businesses. The difference is startling.

Franks makes clear that a warrant based on government falsehoods or material omissions gets no second bite at the apple. *See Franks*, 438 U.S. at 156 (If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided"); *Awadallah*, 349 F.3d at 70, n. 22.

The leap from evidence of innocent behavior to an inference of illegal conduct based on nothing more than repeated falsehoods or reckless omissions of material facts cannot form the basis of probable cause. The Court should grant Mr. Stern a *Franks* hearing to help make this determination in this case.

D. The Wiretaps Must Be Suppressed Because the Government's Failure to Minimize Non-Pertinent Calls Was Pervasive

1. The Government Cannot Make a *Prima Facie* Showing That It Employed Reasonable Minimization Measures

The government cannot make a *prima facie* showing of compliance with the minimization requirements of Title III. *See United States v. Salas*, 2008 WL 4840872, at *8 (S.D.N.Y. Nov. 5, 2008) (identifying five factors to be considered in determining whether the government took reasonable minimization measures during time the wire was running).

First, the monitoring logs, or linesheets, were riddled with errors and cannot be relied upon. For example, despite the fact that each recording should have been assigned a unique "session" identifier, there were hundreds of recordings that were assigned previously used session numbers. For some reason, towards the end of the wire in May, the wire agents repeated session numbers 1-394, thereby duplicating session numbers already attributed to prior March recordings. (*See* Mazurek Decl., ¶ 4.) Thus, the session numbers cannot be relied upon to report accurately the number of actual pertinent or minimized recordings. There are also some recordings that do not have corresponding linesheet entries. (*Id.*, ¶ 5) (no linesheets located for Sessions 2081 and 2110). Finally, there are duplicate linesheet entries for the same session recordings throughout the logs. (*Id.*) The linesheets, therefore, do not represent reliable reporting of what was actually captured on the recordings.

Second, there was inadequate judicial supervision of the progress of the surveillance because the data reported on the six periodic letter reports sent to the supervising judges (*see* Ex. G, Periodic Letter Reports) was faulty. These letter reports relied on the inaccurate and erroneous linesheets. Thus, the judges receiving the statistical summaries of the conversations intercepted, and the quantities and ratios of minimized versus non-minimized and non-pertinent calls could not be accurately evaluated.

Third, the prosecutor, in a letter dated April 17, 2015 (Ex. G), conceded error in initially reporting to the court that minimization instructions for electronic intercepts were, in fact, provided to the agents and interpreters assigned to the wire. The prosecutor later conceded in his letter, dated April 17, 2015, that no instructions were actually provided as to these intercepts for the period from March 31 to April 17, 2015. (*Id.*) This error raises the specter that other instructions may not have been timely or adequately provided. The government has not produced copies in discovery of any minimization instructions that were administered during the time the wire was up and running.

Fourth, the government has not provided any evidence to prove that agents and interpreters assigned to the wire actually confirmed or verified that they read the wiretap orders and applications, the minimization instructions, and any other relevant court orders relating to the wiretap.

Based on the foregoing, the government cannot make a *prima facie* showing that the agents' efforts to minimize interceptions were reasonable.

2. The Government's Failure to Minimize Was Objectively Unreasonable

Further, the government's actual performance of minimization on the Stern wiretap was objectively unreasonable. Over the course of three months of recorded conversations, totaling approximately 1,822 calls (both completed and unconnected calls), there were only 105 designated "pertinent" calls. Thus, the remainder of the 1,822 calls, or 1,717 calls were non-pertinent. Of these, only approximately 78 calls were minimized, and 61 of these exceeded two minutes. (Ex. H.)

Based on our review of the seized Title III recordings, we have identified 121 additional non-pertinent calls that should have been minimized. (Ex. I.) Of these, *58 calls were over 2:00 minutes in duration. (Id.)* Thus, of the total 119 (61 + 58) non-pertinent calls over two minutes in duration, *almost half* were not minimized when they clearly ought to have been. (*Id.*) This result is objectively unreasonable and should lead the Court to suppress all of the Title III wiretaps in order to give some real meaning to the Title III protections to individual privacy interests.

We have attached summaries of all calls that were not minimized, including the 58 calls that were more than two minutes in duration. (Ex. I.) *See United States v. Capra*, 501 F.2d 267, 275-76 (2d Cir. 1974) (creating a government safe harbor for calls less than two minutes). We also attach at Exhibit J to the Stern Notice of Motions a sampling of ten calls, which reveal the intimate and clearly personal nature of the calls that the agents failed to minimize. Many of these calls were privileged marital communications between Mr. Stern and his wife, others were calls with his children and grandchildren, and still others involved Mr. Stern's devout practice of his religion.

Based on this pervasive record of abuse, Mr. Stern also respectfully seeks a hearing so that the monitoring agents and instructing prosecutors may be examined regarding the execution of the wiretap orders and minimization efforts. *See United States v. Goffer*, 756 F.Supp.2d 588, 595 (S.D.N.Y. 2011) (granting hearing to examine agents and prosecutor on instructions and execution where defendant made showing that repeatedly "it was clear from very early in the call[s]" that they were irrelevant to the investigation).

POINT II

THE COURT SHOULD SUPPRESS MR. STERN'S POST-ARREST STATEMENT IDENTIFYING THE PASSCODE TO HIS iPHONE AND THE TAINTED "FRUITS" OF THOSE COMPELLED STATEMENTS, INCLUDING ACCESS TO THE PHONE'S DATA

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."

In questioning Mr. Stern while in custody, the DEA agents ignored and then violated this fundamental constitutional right. Indeed, the agents disregarded even the most basic prophylactic rule that has become such a staple both in our legal system and popular culture. They failed to administer any *Miranda* warnings at all. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

The agents did not stop there. They continued to question Mr. Stern even after he told them – without the benefit of warnings – that he did not want to answer their questions and requested counsel. Although not citing the specific legal principle, Mr. Stern had invoked his Fifth Amendment privilege.

A. Factual Background to Custodial Interrogation

On the evening of May 9, 2016, at approximately 6 p.m., Mr. Stern was returning from work when he was confronted by several DEA agents on the public sidewalk in front of his son's home, only a few houses away from Mr. Stern's own home. (*See* Ex. A, Stern Decl.) The agents identified themselves and told Mr. Stern they wanted to ask him some questions. (*Id.*) The agents told him they did not want to ask their questions in public, but wanted to take Mr. Stern to their offices. (*Id.*) He agreed, but wanted to return home first and have dinner. (*Id.*) Mr. Stern informed the agents he needed to eat because of his diabetic condition and that he needed to have a meal before taking prescribed medication. (*Id.*) The agents told Mr. Stern they could not wait for him and would allow him only to return home to retrieve medicine. (*Id.*) Mr. Stern protested because of his medical condition but to no avail.

The agents followed Mr. Stern into his house without warning to Mr. Stern's wife, who, as a practicing Orthodox Jewish woman, was made to feel extremely uncomfortable in the sudden presence of unannounced men. Mr. Stern tried to explain to her who these men were and what they wanted, but he was confused by the sudden aggressiveness of the agents. (*Id.*) They even followed him into his bathroom and grabbed his iPhone from his hand when he told them he needed to use the toilet. (*Id.*) At age 60 (at the time), Mr. Stern was never arrested before and was shocked by the intrusive conduct of the agents.

The agents denied Mr. Stern the chance to eat something at his house. They told him to take two days' worth of medicine, but refused to explain why. (*Id.*) He was whisked from his home and forced into a car waiting in the street.

The agents took Mr. Stern to a Manhattan office building and government facility. They arrived there at what Mr. Stern recalled was sometime around 7 p.m. (*Id.*) As the agents escorted Mr. Stern into the building, he noticed for the first time that they were carrying firearms. (*Id.*) The agents directed Mr. Stern into a conference room on an upper floor of the building. They all took seats in the room and one of the agents started playing audio recordings from a laptop. (*Id.*) The agents told Mr. Stern that these recordings were part of the evidence they had against him which showed his involvement in money laundering of illegal drug proceeds. (*Id.*) The agents warned Mr. Stern if he did not cooperate with them that he would be facing 40 years in prison, and at age 60, he would never be released again. (*Id.*) At this time, the agents still had not administered any *Miranda* warnings to Mr. Stern. (*Id.*, and Ex. K, Enders Phone Aff., ¶ 6.)

The agents then asked Mr. Stern to tell them about whose drug money he accepted and where he stored it inside his home. (*Id.*) They peppered him with questions about his receiving and distributing cash and why he did it. (*Id.*) Mr. Stern asked the agents if he answered their questions could he go home. (*Id.*) The agents told him they needed to ask the prosecutor before agreeing to release him. (*Id.*)

At some point during this process, one of the agents received a telephone call from one of Mr. Stern's family members. The agent told the person on the call where to come to pick up Mr. Stern's personal property. (*Id.*) The agent then told Mr. Stern to take off his belt and shoe laces, relinquish his wallet, but keep some money for later. (*Id.*) When Mr. Stern asked why he had to do this, the agent responded that they were going to take him to jail and he could not have these items with him there. (*Id.*) No *Miranda* warnings were ever administered at any point during the evening.

Mr. Stern told the agents he did not want to answer their questions and requested counsel. (*Id.*) The agents then took Mr. Stern from the conference room and locked him into a holding cell. (*Id.*) One agent was placed outside the cell. This agent started showing Mr. Stern photographs and asked him questions about what was depicted on them. (*Id.*) All during this time, Mr. Stern remained locked in the cell.

At some point later in the evening, Mr. Stern was released and returned to the conference room. Multiple agents were still in the room. Another agent started asking him personal biographical questions that they told him he had to answer. (*Id.*) It was during this process that Mr. Stern asked for his phone to get the numbers to call his wife and children. He wanted to let them know that he was not coming home. One of the agents agreed to give him the phone to call his family, but only if Mr. Stern told the agents his passcode to the phone. (Ex. K, pp. 3-4.) Mr. Stern did not want to give the agents this information, but felt that he had to in order to be able to communicate to his wife and sons. (Ex. A, ¶ 35.) Mr. Stern was terrified about where the agents would take him. He wanted to talk to his wife and sons so someone would know his whereabouts and be able to contact authorities to locate him if necessary.

Mr. Stern never told the agents that he waived his earlier request for an attorney. (*Id.*, ¶ 38.) The agents did not administer *Miranda* warnings before asking him for his phone's passcode. (*Id.*) Mr. Stern had been at the DEA's office for almost three hours at this point. He was tired and hungry, having been denied the chance to eat before the agents took him from his home. He also was feeling faint from his diabetic condition. (*Id.*, ¶ 41.)

Under these circumstances, Mr. Stern gave the agents the phone's passcode so that he could retain some contact with family and friends. After providing the passcode, one of the agents handed Mr. Stern's phone back to him. (Ex. L, ROI, p. 2.) He was allowed to jot down on a piece of paper the phone numbers he wanted to take from his phone. (*Id.*) However, he did not make calls at that time.

After the agents completed their series of booking questions, they took him to another room to be fingerprinted and photographed. They then handcuffed him from the back and told him they were taking him to jail. (Ex. A, ¶ 40.) No one ever told him what he specifically was being arrested for, or what the criminal charges were that were bring filed in court.

B. Mr. Stern's Post-Arrest Statement, Providing His iPhone's Passcode, Should Be Suppressed Because the Agents Violated the Fifth Amendment by Failing to Administer *Miranda* Warnings Before Custodial Interrogation and Disregarding Stern's Invocation of the Privilege and Request for Counsel

A statement made by the accused "during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [*Miranda*] rights when making the statement." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (internal quotation marks omitted). "It is well settled that *Miranda* requires all individuals who are under arrest, or otherwise in police custody, to be informed prior to interrogation, *inter alia*, of their right to remain silent and to have an attorney present during questioning." *Georgison v. Donnelli*, 588 F.3d 145, 155 (2d Cir. 2009).

If a suspect is not provided with *Miranda* warnings, "the prosecution is barred from using statements obtained during the interrogation to establish its case-in-chief." *United States v. Newton*, 369 F.3d 659, 668 (2d Cir. 2004). The Supreme Court explained: "[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

There can be no factual dispute that at the time that Mr. Stern was detained at various times in a locked holding cell or conference room at DEA headquarters in Manhattan, he was in custody for purposes of Fifth Amendment analysis. Also, Agent Enders, in his affidavit in support of a subsequent search warrant application to search Mr. Stern's smartphone, conceded that Mr. Stern was never given any *Miranda* warnings. (Ex. K, ¶ 6: "Because Stern had previously indicated an unwillingness to make statements regarding the conduct described in the [Criminal] Complaint, no *Miranda* warnings had been provided to Stern at any point prior to this exchange [about the passcode].")

Thus, as an initial matter, it is clear that the government cannot use Mr. Stern's unwarned custodial statements at trial in its case-in-chief. However, that does not resolve the issue here.

In this case, Mr. Stern's presumptively coercive post-arrest statement providing the passcode to his smartphone occurred *after* he actually invoked his Fifth Amendment privilege and requested counsel, despite the lack of warnings. Thus, this case does not fall within the line of unwarned statement cases, as analyzed in *United States v. Patane*, 542 U.S. 630 (2004) (limiting the remedy for unwarned statements to suppression of the statements in the prosecution's case-in-chief, but not applying exclusionary rule to derivative physical evidence).

The agents' questioning here, which induced Mr. Stern to provide his phone's passcode, disregarded his request to stop questioning and for counsel. This created a *per se* violation of Mr. Stern's Fifth Amendment rights under *Edwards v. Arizona*, 451 U.S. 477, 482-85 (1981). In *Edwards*, 451 U.S. at 482-85, the Supreme Court established a second layer of prophylactic rules to the *Miranda* warnings that requires law enforcement officers to cease questioning a subject who clearly asserts his right to have counsel present during custodial interrogation. *See also Diaz v. Senkowski*, 76 F.3d 61, 64 (2d Cir. 1996).

Here, the DEA agents concede that Mr. Stern invoked his right to counsel. In their DEA-6 Report of Investigation ("ROI") detailing their arrest of Mr. Stern, Agent Enders stated that: "Stern declined to answer questions from agents until speaking with his attorney." (Ex. L, ROI, at ¶ 5, p. 2.)

After this invocation, but before being transported to the Metropolitan Detention Center for overnight detention, Agent Enders reported that Mr. Stern sought to make personal phone calls and needed information from his smartphone to make those calls. (*Id.* at ¶ 6, p. 2.) Before authorizing Mr. Stern to obtain telephone numbers from his phone, Agent Enders re-opened questioning by asking him to provide the agents with the smartphone's passcode. (*Id.*) Agent Enders again did not advise Mr. Stern that he had a right to consult counsel – which Mr. Stern already earlier requested – before answering this question. (*See* Ex. K, ¶ 6, p. 4.) Mr. Stern ultimately provided the passcode. (Ex. L, ROI, at ¶ 6, p. 2.) He did so because he was coerced into believing this was the only way he would be allowed to contact his family. (Ex. A, ¶ 35.)

Mr. Stern never waived his earlier request for counsel before being asked for his passcode: a question that clearly sought incriminatory information. *See Doe v. United States*, 487 U.S. 201, 208 n. 6 (1988) (compelled testimony that communicates information that may "lead to incriminating evidence" is privileged even if the information itself is not inculpatory).

C. The Court Should Follow the Holding in *Gilkeson* and Suppress the Derivative Evidence Seized from Mr. Stern's Phone as the Direct Result of the Agent's Intentional Violation of *Miranda/Edwards* and Because the Core Exclusionary Rule Rationale of Deterrence is Implicated

Mr. Stern's rights under the Fifth Amendment were violated by DEA Agent Enders' inducement of Mr. Stern to provide him with the phone's passcode even after Mr. Stern had invoked his right not to answer additional questions and to seek counsel. *See United States v. Gilkeson*, 431 F.Supp.2d 270, 293 (N.D.N.Y. 2006) (suppressing derivative computer evidence seized from a location provided by defendant after he asserted *Miranda* rights and requested counsel).

The DEA agents' conduct in this case violates the bare minimum constitutional protections of *Miranda/Edwards* and implicates the core deterrence rationale of these long-established rules. Under these circumstances, where law enforcement conduct clearly disregards prevailing law, this Court is directed to apply the exclusionary rule. *See id.*, 431 F.Supp.2d at 292-94.

As a practical matter, once Mr. Stern invoked his right to counsel, the DEA knew they had a closing window to gain access to critical information, like his smartphone passcode. The agents also knew that because Mr. Stern owned a newer version of Apple's iPhone (model 6S), it would be highly unlikely that they could safely decrypt the phone and gain access to its data without the passcode. *See In re Order Requiring Apple to Assist in the Execution of a Search Warrant*, No. 15 MC 1902, 2015 WL 5920207 (E.D.N.Y. Oct. 9, 2015). Obviously, if the agents believed that by ignoring Mr. Stern's request for counsel, the only consequence would be suppression of the statement of the passcode itself, they would have no incentive to cease questioning. This is especially true if they believed Mr. Stern could be coerced to give them access to physical evidence that could subsequently be admitted at trial against him.

In this case, the need for deterrence is further justified because the DEA deliberately acted to contravene the *per se* rule requiring them to cease questioning of any kind after Mr. Stern invoked his right to counsel. *Edwards*, 451 U.S. at 484-85 ("[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him.").

Simply suppressing Mr. Stern's post-arrest statement, in which he identified a numeric passcode, offers absolutely no protection against intentional violations of his right to be free from compelled self-incrimination, particularly *after* Mr. Stern expressly invoked his right to counsel. Accordingly, Mr. Stern's motion to suppress the derivative evidence of the data obtained from his smartphone should also be granted.

1. The Holding in *Gilkeson* Applies to the Facts Presented in Stern's Case and Should be Followed by this Court

The facts presented here closely resemble those considered by the district court in *Gilkeson.* In that case, the police were investigating a child abuse complaint. The defendant was taken into custody and questioned by the Syracuse police. *Gilkeson*, 431 F.Supp.2d at 270. Initially, the officers gave the defendant a written *Miranda* form, which the defendant signed and initialed. *Id.* at 275. However, during the course of the ensuing hours of interrogation, he asked several times to call a lawyer. *Id.* at 275-76. These requests were ignored, and eventually Gilkeson made statements identifying the location of a computer that had incriminatory information on it. *Id.* at 276.

The *Gilkeson* court ultimately suppressed the computer and its contents as the tainted fruits from the compelled statements obtained after Gilkeson invoked his Fifth Amendment right to counsel. *Id.* at 294. In reaching its decision, the court distinguished Gilkeson's facts from the Supreme Court's ruling in *Patane*, 542 U.S. at 630.

In *Patane*, a plurality of the Court declined to extend the fruit of the poisonous tree doctrine to suppress physical evidence for failure to provide *Miranda* warnings, even where the police learned about the location of the evidence from the defendant's unwarned custodial statements. *Id.*, 542 U.S. at 634. The *Patane* Court clarified that any suppression rule in the *Miranda* context must meet the Court's close-fit requirement between the Self-Incrimination Clause and its application to protect it. *Id.* at 640. In that case, the Court found that the police conduct did not meet this strict nexus. The facts in *Patane* involved a police officer's failure to complete *Miranda* warnings after the defendant interrupted the officer and said he was willing to answer questions. *Id.* at 634. Thus, it was the arrestee who caused the *Miranda* quandary by interrupting the reading of his *Miranda* rights in the first place. *Id.*

The *Patane* plurality explained that the police's failure to complete *Miranda* warnings not only failed to violate the Constitution, it did not even violate the *Miranda* rule. Specifically, the Court found: "[P]olice do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn." *Id.* at 637. It concluded: "There is, with respect to mere failures to warn, nothing to deter."[2] *Id.* at 642.

The district court in *Gilkeson* distinguished *Patane's* facts from those it analyzed, where the "police conduct . . . clearly *does* violate *Miranda* and its progeny and implicates the deterrence rationale." *Gilkeson*, 431 F.Supp.2d at 292 (emphasis in original). Specifically, the facts in *Gilkeson* revealed that the police violated the *Miranda/Edwards* rule by disregarding the defendant's repeated requests not to answer questions and his requests for counsel. *Id.* at 294. That court concluded that because the police actually violated *Miranda/Edwards* and its progeny, the *Miranda* deterrence rationale did apply, and therefore "the derivative evidence seized from the defendant . . . is subject to the fruit doctrine and is inadmissible for the prosecution's case in chief." *Id.*

Similarly, in this case, the facts show an actual violation of *Miranda/Edwards.* The core rationale for the exclusionary rule of deterrence is equally applicable here. As Agent Enders already conceded in his Report of Investigation, he pursued his questioning of Stern even after Stern requested counsel. (Ex. L, ¶ 5, p. 2.)

Enders sought to avoid this known constitutional problem by claiming that he could only give Mr. Stern access to his phone and contact list if Stern provided the passcode to the phone first. Enders invoked the need to preserve evidence as his rationale to question Stern post-request for counsel. (*Id.*) This pretext does not trump the constitutional rule not to resume questioning after the arrestee asked for counsel. Indeed, because the agent ultimately gave Stern access to the phone

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[2] It should be noted that the Fifth Amendment privilege against compelled self-incrimination clearly extends to exclude derivative evidence outside the *Miranda* context. *See Patane*, 542 U.S. at 646 (citing *United States v. Hubbell*, 530 U.S. 27, 37-38 (2000) (recognizing the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from . . . compelled testimony")); *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

after the agent received the information from Stern about the passcode, the preservation of evidence excuse proved to be an investigative ruse. (*See*, Ex. L, ROI, p. 2.)

In the alternative, Mr. Stern also requests an evidentiary hearing to inquire about Agent Enders' motives in asking for Stern's passcode and to examine the coercive context in which Stern relinquished this information. If the Court concludes that the agent intended to avoid Stern's request for counsel based on a planned technique to undermine Stern's Fifth Amendment privilege, this Court should suppress both the statement and its fruits. *See Missouri v. Seibert*, 542 U.S. 600 (2004) (suppressing post-*Miranda* warning statements where police utilized "question-first" technique, which obtained information from arrestee before administering warnings, and then asking arrestee to repeat information post-*Miranda* warning).

2. This Court Should Also Follow the Holding in *Djibo*, Which Suppressed Defendant's Passcode Statement and Fruits of the Phone's Subsequent Search

Another district court, confronting fairly similar facts, recently suppressed the unwarned custodial statements of a defendant who provided his phone's passcode to federal immigration agents during an airport interrogation. That court also precluded the use of the passcode to decrypt the seized phone. *See United States v. Djibo*, No. 15 Cr. 88 (SJ), 2015 WL 9274916 (E.D.N.Y. Dec. 16, 2015). In that case, the defendant was detained by customs and immigration agents at the airport for being a suspected narcotics trafficker. *Id.* at *1-2. The defendant's phone was taken from him and agents asked him to give them the code to open the phone. *Id.* The district court found that despite the broader latitude given to agents at the border, the detention and questioning of Djibo went beyond the normal border search. *Id.* at *10. The court found that *Miranda* warnings should have been issued and the passcode statement had to be suppressed for violating the defendant's Fifth Amendment privilege. *Id.* at *7. It also suppressed the subsequent search of the phone based on the use of the compelled passcode. *Id.* at *7-8. The district court found the deterrence rationale of the exclusionary rule to be implicated by the agents' conduct in that case. *Id.* at *7 (finding that the request for the iPhone passcode "completely changed the stage because the purpose of the original search was to find currency and currency cannot be found on a phone").

As stated above, the violation of Mr. Stern's Fifth Amendment privilege is even more egregious than the facts presented in *Djibo*. While in *Djibo* the facts showed merely a presumptively compelled statement without *Miranda* warnings, the facts here show an intentional disregard of Stern's Fifth Amendment privilege *after* he actually invoked it and requested counsel. In the view of at least the *Djibo* court, statements obtained through unwarned custodial questioning, when coupled with an intentional plan to obtain incriminatory evidence in contravention of the Fifth Amendment, can form the basis for application of the exclusionary rule. *See Seibert*, 542 U.S. at 614 (finding exclusionary rule's deterrence rationale applied to systematic police misconduct to undermine arrestee's constitutional privilege). This reasoning equally applies to the facts here. This Court should adopt the *Djibo* court's reasoning and apply the exclusionary rule to the data obtained from Stern's phone.

D. The Subsequent Search Warrant for the iPhone Did Not Remove the Taint of the *Miranda/Edwards* Violation

A week after the arrest of Mr. Stern, Agent Enders went to the court and applied for and obtained a search warrant for the contents of Mr. Stern's iPhone. (*See* Ex. K, Enders Phone Aff. And Warrant, May 16, 2016.) This action did not remove the taint of the earlier Fifth Amendment violations against Mr. Stern.

While the search warrant was a necessary condition to search the iPhone under the Fourth Amendment, *see Riley v. California*, 134 S.Ct. 2473 (2014), the warrant did not remove the practical problem of not being able to open the phone without the use of the unlawfully obtained passcode. *See Djibo*, 2015 WL 9274916, at *5-6; *see also In re Apple Order*, 2015 WL 5920207, at *5 and n. 3.

The government cannot sustain its burden of showing that it would have been able to safely and inevitably access the data on Mr. Stern's iPhone 6S absent the passcode information from him. Recent evidence presented by government agents in federal courts here in New York reveal the technological difficulties that exist to decrypt newer Apple iPhone models without the assistance of the phone manufacturer (Apple) or cooperation of the phone's owner. *See In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court,* 149 F.Supp.3d 341 (E.D.N.Y. Feb. 29, 2016).

Moreover, the government was in possession of both Mr. Stern's iPhone and passcode from the night of his arrest on May 9, 2016 through May 16, 2016, when Agent Enders applied for a search warrant. There may have been countless searches of the phone during this week because the agents had clear access to the data. As part of any hearing granted by the Court based on these motions, Mr. Stern should be given leave to explore the agents' conduct in this regard.

The *Djibo* court faced a similar set of facts in its case, namely the compelled custodial statement by the defendant relinquishing his iPhone passcode and federal agents subsequently obtaining a search warrant to search and seize data from the phone. In *Djibo*, the district court applied the exclusionary rule and rejected the government's attempt to apply the inevitable discovery exception to the exclusionary rule. *Djibo*, 2015 WL 9274916, at *10-11.

Here, too, the Court should suppress the fruits of the *Miranda/Edwards* violations, namely the phone data, which only could have been accessed through the use of Mr. Stern's compelled statement in violation of his Fifth Amendment privilege.

POINT III

THE COURT SHOULD SUPPRESS EVIDENCE SEIZED FROM THE STERN PHONE BECAUSE THE SEARCH WARRANT LACKED PARTICULARITY AND WAS OVERBROAD IN VIOLATION OF THE FOURTH AMENDMENT

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Thus, the Warrants Clause both "requires particularity and forbids overbreadth." *United States v. Cioffi*, 668 F.Supp.2d 385, 390 (E.D.N.Y. 2009). "Although somewhat familiar in focus, these are two distinct legal issues: (1) whether the items listed as 'to be seized' in the warrant were overbroad because they lacked probable cause and (2) whether the warrant was sufficiently particularized on its face to provide the necessary guidelines for the search by the executing officers." *United States v. Hernandez,* No. 09 Cr. 625, 2010 WL 26544, at *7 (S.D.N.Y. Jan. 6, 2010) (citations omitted).

The warrant for the search of electronic data located on the Stern Phone violated both of these requirements.

A. Factual Background to Warrant

On May 16, 2016, Magistrate Judge Barbara Moses issued a search warrant for the electronic data contained in the storage of the Stern Phone. (*See* Ex. K, Search Warrant and Application, May 16, 2016.) This is the same phone that was seized from Mr. Stern on the date of his arrest on May 9, 2016, and the subject of the previously discussed Fifth Amendment suppression motion. As explained, the compelled passcode made it possible for the agents to gain safe access to the data and search it pursuant to this contested warrant. While the Fifth Amendment arguments, *supra*, are sufficient for this Court to suppress the contents of the Stern Phone, if the

Court disagrees, Mr. Stern alternatively moves under the Fourth Amendment to suppress its contents.

Probable cause to search the Stern Phone was based upon the affidavit of DEA Agent Enders. (Ex. K.) Enders relied largely on the contents of the Criminal Complaint that was filed against Stern, leading to his arrest on May 9. The Complaint was attached to the Enders Phone Affidavit submitted to the magistrate. As to probable cause that evidence of the charged money laundering offenses would be found on the seized phone, the agent relied on his experience to conclude that money launderers commonly used mobile devices to carry out their offenses. (Ex. K, Enders Phone Aff., pp. 4-5.)

The Enders Phone Affidavit was not incorporated by reference into the Stern Phone Warrant. (*See* Ex. K.) "Rider A," the sole attachment to the Stern Phone Warrant, lists the "Information to be Retrieved from the Target Device." (*Id.*) Those items are as follows:

> a. Any and all telephone numbers, including telephone number(s) assigned to those devices;
> b. Any and all caller/user identification information;
> c. Any call log information;
> d. Any information about recently called numbers, recently received calls, and recently missed calls;
> e. Any address information or other identification information; and
> f. Any and all voicemail messages, alpha-numeric ("text") messages, e-mails, photographs and videos related to the TARGET OFFENSES [defined as federal money laundering statutes].

(*Id.*, at Rider A.)

B. The Stern Phone Warrant Lacked Sufficient Particularity

1. Applicable Legal Standard

The Fourth Amendment requires that warrants state with particularity the items to be searched and seized. The core purposes of the particularity requirement include "preventing general searches, preventing the seizures of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis." *United States v. Young*, 745 F.2d 733, 759 (2d Cir. 1984). Law enforcement agents are thus barred from executing warrants that purport to authorize "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *see also United States v. George,* 975 F.2d 72, 74 (2d Cir. 1992) ("Because everyone has some kind of secret or other, most people are anxious that their personal privacy be respected. For that very human reason the general warrant, permitting police agents to ransack one's personal belongings, has long been considered abhorrent to fundamental notions of privacy and liberty.").

Courts implement the particularity requirement by insisting that warrants not "leave to the unguided discretion of the officers executing the warrant the decision as to what items may be seized." *United States v. Riley*, 906 F.2d 841, 844 (2d Cir. 1990) (citations omitted). In other words, a warrant must contain sufficient specificity "to permit the rational exercise of judgment [by the executing officers] in selecting what items to seize." *United States v. Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (citation omitted); *see also George*, 975 F.2d at 75 (explaining that warrant is sufficiently particular only if it "enable[s] the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize.").

It is clearly established that the supplementary documents, including affidavits submitted to a magistrate judge to demonstrate probable cause, can particularize a warrant *only* if attached and incorporated into the warrant by reference. *See United States v. Rosa*, 626 F.3d 56, 64 (2d Cir. 2010) ("[W]e may no longer rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant."); *George*, 975 F.2d at 76 ("Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it."); *cf. Groh v. Ramirez*, 540 U.S. 551, 557 (2007) (noting that "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents."); *United States v. Zemlyansky*, 945 F.Supp.2d 438, 453 (S.D.N.Y. 2013).

In the Second Circuit, there is no settled formula for determining whether a warrant lacks particularity. Nonetheless, in a thorough and well-reasoned opinion, Judge Karas has noted "two factors that, above others, tend to define a warrant's insufficient particularity." *United States v. Vilar*, No. 05 Cr. 621, 2007 WL 1075041, at *22 (S.D.N.Y. Apr. 4, 2007). One of those factors is whether the warrant omits telling the searching officer for what crime the search is being undertaken. Judge Karas described the other as: "warrants will frequently lack particularity where they include a general, catch-all paragraph or provision, often one authorizing the seizure of any or all records of a particular type." *Id.* (quotation marks and internal citations omitted). Courts do not require that a defendant demonstrate *both* of these deficiencies; rather, one or the other will typically render a warrant unconstitutional. *See United States v. Buck*, 813 F.2d 588, 591 (2d Cir. 1987) (holding warrant lacked particularity because it contained catch-all provisions).

The factors identified by Judge Karas are not exhaustive: lack of particularity may result from, or at least be suggested by, other circumstance-specific considerations. For example, "[i]n a number of out-of-circuit decisions, courts have found warrants for the seizure of records constitutionally deficient where they imposed too wide a timeframe or failed to include one altogether." *United States v. Cohan*, 628 F.Supp.2d 355, 365-66 (E.D.N.Y. 2009).

2. The Phone Warrant's Items to be Searched and Seized Were Excessively Broad, Not Temporally Limited, and Failed to Give Sufficient Direction to Searching Agents

The Stern Phone Warrant contains excessively broad categories of items to be searched and seized, thereby permitting a searching officer to rummage through and seize personal and identifying information about almost any individual with whom Mr. Stern ever mentioned financial, money, or business related transactions of any kind using his phone.

The only limitation placed on the searching agents' rummaging was that the information (voice-mail, email, text message, photograph, or video) had the possibility of being related to money laundering offenses. (*See* Ex. K, Stern Phone Warrant.) This is hardly a relevance limitation at all because the warrant did not include any reference to the underlying criminal activity that was alleged to be the source of the criminal proceeds. Thus, an agent, relying only on the warrant and Rider A, *see Groh*, 540 U.S. at 557, would be able to seize all private information about a person who Mr. Stern dealt with in any financial way at all. This is particularly troubling and invasive in this case because Mr. Stern, as explained in detail above, was a salesman for more than fifteen years of wholesale watches and jewelry, and had conducted much of this legitimate business over the phone. *See e.g., United States v. SDI Future Health, Inc.*, 568 F.3d 684 (9th Cir. 2009) (excising warrant item of "rolodexes and address books," because "practically begs the search team to find and to seize the contact information of every person who ever dealt with" the defendant due to warrant not relating item to specific facts about the alleged fraud).

The agent's failure to specify on the warrant the allegation that the money laundering crimes involved narcotics proceeds and bulk cash transactions provides an independent basis for deeming the warrant deficient. *See Buck*, 813 F.2d at 591 (finding impermissibly broad a warrant rife with "general boilerplate terms, without either explicit or implicit limitation on the scope of the search"); *see also Wheeler v. City of Lansing*, 660 F.3d 931, 941 (6th Cir. 2011) (in the context of a search of a house for stolen goods, categories in a warrant are overbroad where they "provid[e] no basis to distinguish the stolen items from [the defendant's] own personal property."); *Hernandez*, 2010 WL 26544, at *10 (the categories of items to be seized from a business lack particularity where they "could have encompassed most all of the business records on the premises").

The Stern Phone Warrant also is defective for failing to state any relevant time period at all. *See United States v. Abboud*, 438 F. 3d 554, 576 (6th Cir. 2006) (holding that a warrant was insufficiently particular because it was not limited to documents from the time period for which the magistrate had probable cause to believe fraud had occurred); *Roberts v. United States*, 656 F. Supp. 929 (S.D.N.Y. 1987), *rev'd on other grounds*, 852 F. 2d 671 (2d Cir. 1988) (where no limit as to dates of documents to be seized, the warrant gave rise to a general, exploratory search).

Further, the Warrant allows for the seizure of "any and all" categories of materials that other courts have recognized to be impermissibly broad. For instance, it covers "[a]ny and all voicemail messages, alpha-numeric ("text") messages, e-mails, photographs and videos," without indicating any individuals, entities, time frames, or relevance to the alleged offenses. *See United States v. Gigante*, 979 F.Supp. 959, 966-67 (S.D.N.Y. 1997) (describing as "broad and vague" a warrant item authorizing seizure of all "financial, banking, safe deposit, investment, asset, tax, bookkeeping, and accounting records – along with underlying, supporting, and related documentation – of or referring or relating to [certain individual and entities]" where the warrant did not adequately specify to whom or what these items had to relate). The warrant also reaches all "caller/user identification information," "any address information or other identification information," "any and all telephone numbers," and "any information about recently called numbers, recently received calls, and recently missed calls," without any indication of which persons, telephone numbers, email addresses, identification information, or other businesses were under investigation. (Ex. K, Rider A.) *See Zemlyansky*, 945 F.Supp.2d at 457-58 (finding warrant lacked particularity where broad items such as calendars, appointment records, medical files and patient information were not limited by warrant to indicate which clinics, doctors, patients or medical facilities were being investigated for health care fraud).

At bottom, missing from all of these broad categories of communication and identification information – and from this warrant in general – are any instructions to the agents to search and seize records related to the receipt and transfer of narcotics proceeds – which is at the center of the alleged conspiracy in question. Moreover, the Warrant failed to relate the money laundering offenses to particular suspects in the case, or to the time period of the suspected conspiracy, or to specific bulk cash transactions, or any other limits.

The Stern Phone Warrant authorized the agents to search for and seize almost everything on the Stern Phone. Mobile phones today are hardly only phones. They act as the main receptacle for a person's business and private records and communications, including personal finances. Mr. Stern's iPhone 6S had a storage capacity of 64 gigabytes, which can store literally millions of pages worth of information.[3] This warrant basically gave *carte blanche* to federal agents to grab identifying information, personal and private communications, and photographs and videos of any person or entity with whom Mr. Stern had any financial dealings. The only limitation to this was that a money or property transaction was chronicled on the phone in any medium (text, email, voicemail, photo or audio message). In practice, this could include almost any family member he transferred money to; any charitable or religious organization to which he contributed; or any customer of TimeWorks who bought watches from Mr. Stern as a salesman for that company.

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[3] A single gigabyte of storage is estimated to contain the equivalent of about 65,000 pages worth of Microsoft Word documents. *See Home Many Pages in a Gigabyte*?, http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitepapers/ADI_FS_PagesInAGigabyte.pdf (last visited February 9, 2017). Putting the pieces together, a single 64-gigabyte mobile device could store over 4,160,000 pages of Microsoft Word documents.

In short, the broad, undefined, unrelated, unlimited as to time, and boilerplate items of this search warrant render it, for all practical purposes, a prohibited general warrant to search Mr. Stern's most private communications and interactions.

C. The Stern Phone Warrant Is Facially Overbroad

1. Applicable Legal Standard

In determining whether a warrant is overbroad, courts must focus on "whether there exists probable cause to support the breadth of the search that was authorized." *Hernandez*, 2010 WL 26544, at *8. A warrant permitting "fairly broad" types of materials is permitted if "the affidavit in support of the search warrant application provides the necessary basis for a determination of probable cause to seize items in each of these categories." *Id.*

The generality of the warrant, however, and its listing of categories divorced from any articulation of a specified criminal scheme or offense, cannot be salvaged by the supporting affidavit, if it was neither attached to nor incorporated in the warrant. *See Groh*, 540 U.S. at 557-58; *see also George*, 975 F.2d at 76 ("A sufficiently specific affidavit will not itself cure an overbroad warrant. Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference to the warrant itself and attached to it.") (internal citation omitted); *Zemlyansky*, 945 F.Supp.2d at 453 (same).

2. The Enders Affidavit Did Not Justify a Sweeping Search of All Information on the Stern Phone for People or Entities With Whom Mr. Stern Had Any Financial Interaction

While the Enders Phone Affidavit provided information about certain people who were identified with narcotics trafficking and bulk cash transactions, this information was never conveyed on the Stern Phone Warrant and the affidavit was not incorporated by reference.

Thus, the breadth of items included on the warrant exceeded the probable cause showing in the affidavit. Because the criminal offenses cited on the warrant were simply general violations of the federal money laundering statutes (18 U.S.C. §§ 1956, 1957, and 1956(h)), and were not related to the "specified unlawful activity" of narcotics trafficking and particular bulk cash transactions, the government lacked probable cause to search and seize all of the items listed on the warrant. Specifically, the government lacked probable cause to seize all communications, identifying information, contact or call information for every person, phone number, or entity, which discussed or mentioned a financial or property transaction on Mr. Stern's phone.

The federal money laundering statutes at 18 U.S.C. §§ 1956-57 encompass all manner of conduct in engaging in financial transactions to conceal, promote, transport, or avoid financial reporting requirements with proceeds from a specified crime. 18 U.S.C. § 1956. The statute also encompasses simply knowingly engaging in financial transactions with criminally derived property. 18 U.S.C. § 1957. The criminal property or money must be from "specified unlawful activity," which is defined at 18 U.S.C. § 1956(c)(7). However, this requirement provides little limitation because the definition of "specified unlawful activity" literally lists dozens of crimes, cross-references others, and includes almost all conceptions and possibilities of "schemes to defraud."

Thus, a searching agent based on the warrant's general direction can make almost no determination whether any financial transaction discussed in the 64-gigabytes of possible data in Mr. Stern's phone is evidence of a legitimate transaction or alleged money laundering crime. By the very nature of money laundering, the alleged perpetrator is trying to use a legitimate financial transaction to mask the criminal source of funds. Without any indication on the warrant relating the alleged money laundering to a specific underlying crime or the type of property being laundered, the agents were left to seize almost anything on the phone mentioning property, money or financing. Accordingly, the Stern Phone Warrant is overbroad.

"The Fourth Amendment's requirements regarding search warrants are not 'formalities.'" *United States v. Voustianiouk*, 685 F.3d 206, 210 (2d Cir. 2012) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948). Because the government's agents violated plain principles of the Fourth Amendment, suppression of evidence taken from the Stern Phone is warranted.

CONCLUSION

For all of the foregoing reasons, this Court should grant the relief requested herein in its entirety, and order any other relief that this Court deems just and proper.

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New York, New York

Respectfully submitted,

/S/ HEM

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